Supreme Court, U.S.
FILED

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No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1994

Jerome S. Wagshal,

Petitioner,

v.

Mark W. Foster, et al.

Respondents.

Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The District Of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

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** A member of the Bar of this Court, acting as counsel of record*

December 14, 1994 (Revised)

QUESTION PRESENTED FOR REVIEW

What kind, if any, of judicially created immunity from civil suit should be conferred on a court-appointed mediator, and specifically:

a. Is a mediator entitled to (i) absolute "quasi-judicial" immunity or (ii) qualified immunity, and, regardless of which,

b. when the mediator deliberately acts beyond his authority and function by making adversarial recommendations to the appointing court and critical public statements about one of the parties to the mediation based on supposedly confidential information gleaned from the mediation, should the mediator be given immunity from civil suit by a party injured by the mediator's actions?

PARTIES IN THE PROCEEDINGS BELOW

Petitioner Jerome S. Wagshal was the plaintiff in the United States District Court for the District of Columbia, and the appellant in the United States Court of Appeals for the District of Columbia Circuit

Respondents, who were defendants in the United States District Court for the District of Columbia, and appellees in the United States Court of Appeals for the District of Columbia Circuit, are: Mark W. Foster, and his partners: Roger E. Zuckerman, Roger C. Spaeder, Bruce Goldstein, William W. Taylor III, Peter R. Kolker, Janet M. Meiburger, Stephen H. Glickman, Lawrence A. Katz, Anthony Thompson, Nelson C. Cohen, Steven M. Salky, Edward C. Berkowitz, Judith Sturtz Karp, Donald J. McCartney, Eric F. Facer, and Marshall S. Wolff.

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Petition For A Writ Of Certiorari To The
United States Court Of Appeals
For The District Of Columbia Circuit

Jerome S. Wagshal respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (**App.** A, *infra*) is reported at 28 F.3d 1249 (D.C.Cir. 1994).

GROUNDS FOR JURISDICTION IN THIS COURT

Petitioner's petition to the Court of Appeals for rehearing was denied on September 16, 1994. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Sec. 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

The immunity challenged by this case is entirely judge-made.

STATEMENT OF THE CASE

Nature Of The Case

The issue presented by this petition is

whether absolute or qualified judicially-created immunity from civil suit should be accorded to court-appointed mediators, and whether any such immunity should shield mediators from civil suit when they deliberately act beyond their mediating function, and make public recommendations to the court based on knowledge gained during a mediation session.[1] The issue of mediator immunity has never previously been considered by this or any other court prior to this case. The increasing pressures placed on litigating parties to engage in mediation as an alternative to litigation make this an important issue calling for a definitive pronouncement by this Court. Indeed, such pressures sometimes, as in this case, go so far as compulsory participation.

The Court of Appeals held that a mediator conducting a compulsory mediation is ab-

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1. See Foster's statement, particularly sentence [1], quoted at p. 11, *infra*, for Foster's admission that his offending statements were based on knowledge gained from his mediation work.

solutely immune from civil suit even when he[2] elects to go outside the mediation process and assumes the role of an advisor to the court, and an advocate for one side or the other.

As more fully explained below, the function of mediation is uniformly recognized as being inherently one in which the mediator deals with the parties under a solemn commitment of confidentiality and non-disclosure to the court of anything learned in the mediation, and an equally solemn assurance of neutrality--not to take either side in any of the adjudicative aspects of the litigation. The issue presented here is whether the mediator should be granted any form of immunity to violate these fundamental constraints on his role, speaking out voluntarily to the appointing court against one side or the other.

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2. Petitioner uses the masculine pronoun in generalized statements in this petition as a matter of literary convenience, recognizing that such statements properly should be stated as "he or she...."

Statement Of Facts

No textbook hypothetical could create a better factual setting for consideration of the limitations on mediator immunity than what occurred in this case. In summary, a court-appointed mediator who was restricted by the order appointing him from making any substantive report to the appointing court violated that restriction by making adversarial written recommendations to the court. His actions were even more extreme because the mediator's partisan recommendations were made immediately after he resigned his appointment.

Petitioner, the plaintiff below (sometimes herein "plaintiff" or "Wagshal"), was previously a plaintiff in an action in the Superior Court of the District of Columbia charging fraud against one "Sheetz," a real estate property manager.[3] Foster is a

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[3]. *Jerome S. Wagshal v. Charles E. Sheetz, et al.*, Civ. No. 90-CA06155 (Superior Ct. DC, complaint filed June 6, 1990). In addition to Sheetz himself, others allied with him, including his attorney, were named

lawyer in private practice who was appointed by the Superior Court judge in the *Sheetz* case to conduct "neutral case evaluation,"[4] an alternative dispute resolution ("ADR") procedure the stated purpose of which was to give the parties an impartial lawyer's evaluation of each side's case, which would hopefully encourage settlement.

Throughout this case, "neutral case evaluation" has been held to be equivalent to mediation.[5] Petitioner accepts this conclusion of functional equivalence for purposes of analysis,[6] and for ease of expression

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as defendants and participants in the fraud. References to "Sheetz" herein are generally meant to include all the *Sheetz* case defendants.

4. Foster was appointed after a prior appointee had disclosed a conflict of interest and his appointment had been withdrawn on plaintiff's motion.

5. The District Court held that, "For purposes of this case the functions of mediators and evaluators are indistinguishable," **App. B** at 2, n. 2. and the Court of appeals agreed. **App. A** at 2, n. 2.

Foster repeatedly referred to himself as being a "mediator." For example, at the telephone hearing at which he resigned, Foster identified himself as, "Mark Foster, formerly the court-appointed mediator in this case." Other similar examples are quoted in the text, *infra*.

6. The two procedures are identical with respect to the twin obligations of confidentiality and

Foster will henceforth be referred to as a mediator.

The Court *compelled* the parties to participate in this mediation, and stayed all pretrial procedures, including discovery, pending its completion. Wagshal objected to the stay as premature, because he had instituted discovery, which Sheetz had objected to, designed to disclose by how much Wagshal had been defrauded. Thus the stay on discovery precluded Wagshal or Foster, or anyone but Sheetz, from being able to make an informed evaluation of the case. Sheetz of course would not withdraw his objections to the discovery. The Court nevertheless overruled Wagshal's objections to the stay and compelled him to participate in the mediation.

At the first mediation session held by Foster, he disclosed that he and his firm had in the past been repeatedly retained by Home

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neutrality, which are at the center of this case.

Insurance, an insurance company which was then insuring one of the *Sheetz* case defendants. When Wagshal, through his attorney, raised a question about Foster's neutrality as a result of this relationship, Foster demanded that Wagshal state whether he would waive objection to Foster's continuing to serve. Wagshal agreed to do so, requesting only Foster's assurance that he regarded himself as neutral in view of the possibility that Home Insurance might retain Foster or his firm in other matters in the future.

Dissatisfied with this response, Foster resigned. This could have ended his involvement in the case. However, Foster wrote letters to both the presiding judge and the parties containing statements critical of, and clearly prejudicial to, Wagshal, including a thinly veiled accusation that Wagshal was acting in bad faith. When Foster's letters had an obvious, and seriously adverse effect on the court, Wagshal was so clearly disad-

vantaged that he felt compelled to settle his fraud case, despite his wish not to.

Four documents, taken together, provide the factual frame of this litigation. Two of the documents constituted the charter of Foster's appointment, and establish Foster's twin obligations of confidentiality and neutrality. The other two documents are Foster's letters which violated those obligations.

A. The two documents Which Established Foster's Obligations

The order appointing Foster, **App. D**, provided that "the confidentiality of the Evaluation [mediation] be governed by the Statement of Understanding which shall be signed by all parties and counsel," and limited the mediator's consultations with the Court to "matters of timing and procedure...." The "Statement of Understanding," **App. E**, in turn, assured the parties that Foster "will serve as a neutral party," [emphasis in original], that he would "not

act as an...advocate for any party," and, "In no event will a mediator or evaluator voluntarily testify on behalf of a party." Thus, these two documents taken together, establish the two basic principles which were intended to govern Foster's role:

(i) That Foster was required to serve as a neutral party, and could not act as an advocate for either side; and

(ii) That Foster was required to maintain the confidentiality of the evaluation process by not testifying or reporting to the Court. This would clearly include a prohibition against communicating substantive recommendations to the Court.

B. Foster's Two Letters Which Violated His Obligations

When Foster resigned rather than comply with Wagshal's request for an simple assurance of impartiality, he fired off two letters, both written on the letterhead of

Foster's firm.[7] One was to the court ("the Foster court letter," **App. F**), and the other to all counsel in the case ("the Foster counsel letter," **App. G**).

The Foster court letter, **App. F**, informed the Court that after Foster had held a meeting with the parties he had, "received a letter from plaintiff's counsel challenging my neutrality in this matter on account of various connections between this firm [sic] and the Home Insurance Company." Foster reported that he had, "insist[ed] that plaintiff and his counsel either waive any objection or consent to my going forward." [sic, possibly intended for an alternative construction.] Noting that plaintiff's "consent had not been forthcoming,"--a serious distortion since plaintiff had offered to accept Foster's assurance of neutrality--Foster told

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[7]. Foster consistently acted as a member of his law firm. The potential conflict of interest involved his law partnership, and all Foster's actions were clearly done within the scope of his firm's business. This was the basis for naming some of Foster's partners as defendants.

the court that, "I feel that I must recuse myself and recertify this matter to you."

At this point Foster could have ended his letter since, by his choice, he had concluded his involvement in the case. However, Foster then volunteered two paragraphs containing seven blistering statements critical of plaintiff, which are the heart of plaintiff's complaint. Although plaintiff's injury from Foster's statements was averred in his verified complaint and must be accepted as true at this point, since the case was dismissed on motion, *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957), a brief explanation of the nature of plaintiff's injury may serve to make the issues clearer. Foster's seven statements are therefore quoted below with a brief comment regarding the injury created by each:

> [1] "Based upon the knowledge that I have obtained in this case up to this point, I strongly urge you to order Mr. Wagshal, as a pre-condition to any further proceedings in his case, to en-

> gage in a good faith attempt at mediation. [sic for "case evaluation"]."

Here, Foster admitted that all his statements were based on the knowledge obtained by his involvement as a mediator in the case, which was supposed to be confidential. This statement is obviously an implied accusation that plaintiff had not previously acted in good faith. His "urging" that plaintiff be required to alter his conduct as a "pre-condition to any further proceedings in his case," impaired plaintiff's constitutional right of access to the courts. This impairment apparently could only be cured by a future breach of the confidentiality of the mediation process, in order to establish plaintiff's changed conduct had exhibited "good faith."

> [2] "In my view, and based upon my experience as a Superior Court mediator [sic], this is a case that can and should be settled if the parties are willing to act reasonably."

Plaintiff had told Foster that he was disinclined to settle until Sheetz was compelled

to respond to discovery which revealed the extent of the fraud. Foster's volunteered recommendation, which was further unsworn testimony, that the case "should be settled" was directly opposed to plaintiff's interests.

> [3] "Even if no settlement is forthcoming, this case can surely benefit from some agreed-upon-phased discovery rather than an unregulated discovery free-for-all."

This emphasis on an agreed discovery program again favored *Sheetz* who would never agree to this disclosure. Foster's unsworn testimony in effect again urged blockage of plaintiff's access to the judicial system.

> [4] "Mr. Wagshal has now challenged two neutral mediators [sic] appointed by this court, in both cases on grounds that can be characterized as attenuated."

Plaintiff's challenge to Foster's predecessor had been approved by the Court before Foster ever became involved in the case, and this gratuitous criticism by Foster, still more unsworn testimony, this time of a matter oc-

curring before Foster's appointment, was calculated to make plaintiff out as a chronic frivolous challenger. This appeared to be Foster's way of retaliating against a question being raised regarding his neutrality.

> [5] It seems to me that Mr. Wagshal ought to be required to fulfil his obligations under the court's rules concerning mediation [sic] before he is allowed to proceed with his suit.

This statement is predicated on non-existent rules, and non-existent obligations. There are no Superior Court rules "concerning mediation" which place "obligations" on litigating parties, other than attendance. The accusation that plaintiff had failed "to fulfil" non-existent "obligations" under non-existent "rules" was clearly calculated to prejudice the plaintiff in the eyes of the Court. Worse yet, the repeated recommendation to delay the case was contrary to plaintiff's interest in prosecuting the fraud of which he had been the victim, before memories dimmed.

> [6] You may also wish to consider who should bear the defendant's costs in participating in two aborted mediations.

In context, this was an clear recommendation to assess monetary penalties against plaintiff, in violation of the neutrality required of Foster.

> [7] I very much regret the time that has now been wasted by my predecessor, Mr. Kaplan, and by all counsel and their clients as a result of this second failure to complete scheduled mediation.

Foster's charge that plaintiff had wasted time a second time by raising a question regarding Foster's neutrality, and his repeated criticism of plaintiff's earlier challenge to his predecessor, was still more unsworn testimony against the plaintiff.

This analysis picks each sentence apart, but the cumulative effect of Foster's statements was far more damaging, the whole being greater than the sum of its parts. No ordinary witness would have been permitted to say such things as testimony at a court hearing.

If Foster had been permitted to make such statements as a witness, he had opened obvious areas of potential cross-examination regarding his bias and prejudice for a perceived slight to his neutrality, as well as his interest in potential future business from Home Insurance. Foster's statements were essentially arguments made by an opposing party.

Contemporaneously with his letter to the Court, Foster sent a letter to all counsel ("the Foster counsel letter"--**App. G**), in which he enclosed a copy of the Foster court letter, **App. F**, and made several additional critical observations about the plaintiff. Speaking of plaintiff's request that Foster state whether he felt he could serve impartially, Foster stated:

> ...Mr. Shaughnessy and his client continue to attempt to straddle the issue by casting on me the burden of a sort of voir dire process. I am not satisfied by this attempt to "conditionally object" to my objectivity so that, if the mediation process

> does not go as he wishes, Mr. Wagshal can attack my impartiality at a future point.

Here was a charge that plaintiff was deceitfully attempting to set Foster up for a future attack, "if the mediation process does not go as he wishes...." Foster was characterizing plaintiff as a devious potential future adversary, not speaking in a neutral fashion about plaintiff as a party to mediation.

It would be blinking reality not to recognize the extreme prejudice inherent in Foster's statements.[8] In significant respects, the Court followed Foster's recommendations, to plaintiff's considerable disadvantage. The Court held that, "this case is not moving forward until some efforts have been made at settlement [or] to develop a discovery plan." More important, the Court continued its refusal to rule on plaintiff's

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8. *Compare Parker v. Gladden,* 385 U.S. 363, 365 (1966)(holding that it would be blinking reality not to recognize the extreme prejudice of a bailiff's statements to jurors regarding an accused's guilt).

pending motions to compel document production. Finally, the Court indicated it would have imposed sanctions on plaintiff but for the fact that Foster had inartfully phrased his ultimatum letter so as to permit plaintiff's silence to constitute a refusal to waive objections.

Plaintiff attempted to mitigate the damage by seeking a protective order against use of Foster's letters in future proceedings, but Sheetz opposed this motion and the Court denied it, so that plaintiff would have had to litigate his fraud charge against Sheetz under the cloud of Foster's charge of plaintiff's bad faith which plaintiff never had an opportunity to refute.

The Court then appointed yet a third mediator, Coleman Hicks, Esq., who disclosed that he, too, had a possible conflict of interest, involving prior relationships with Sheets' attorneys, which might make his neutrality open to question. Plaintiff once

again requested, but this time received and accepted, Hicks' assurance of neutrality. Then plaintiff accepted a settlement for substantially less than sought in the complaint, having never obtained the discovery which would have provided information about the full sum of which he had been defrauded.[9]

Thereafter, this case was filed against Foster.

Course of Proceedings and Disposition In The Courts Below

The complaint against Foster contained eight counts: Count I - Deprivation of Constitutional Rights (1st and 5th amendments); Count II - Defamation (the Foster court letter); Count III - Defamation (the Foster counsel letter); Count IV - Invasion of Privacy (the Foster court letter); Count V - Invasion of Privacy (the Foster counsel letter); Count VI - Breach of Confidential

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9. The facts stated in the preceding paragraphs were taken from the statement in plaintiff's appellate brief, where they were meticulously referenced to the record on appeal.

Relationship; Count VII - Breach of Fiduciary Obligation; and Count VIII - Intentional Infliction of Severe Emotional Distress.

The District Court decided the case in Foster's favor in the most summary fashion. Foster moved to dismiss or for summary judgment, but since Foster's motion was supported by affidavit, his motion was a motion for summary judgment. Rule 12(b), Fed.R.Civ.P. However, the district court granted "defendants' motion to dismiss or for summary judgment...." In short, the Court summarily ruled against plaintiff in every way open to it. *See* **App. B.**[10]

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10. In a final footnote, the District Court "invite[d] the defendants other than Mr. Foster to apply for sanctions pursuant to Fed.R.Civ.P. 11 if they elect to do so." The district court did this based on the holding that it was, "unable to perceive any basis upon which plaintiff might have concluded that Mr. Foster's law firm and his partners, as distinguished from Mr. Foster himself, could be liable to him on the allegations of his complaint." The court, ignored (i) defendants' concession in their summary judgment memorandum that for purposes of the motion they did not contest the allegation that Foster was acting within the scope of his firm's business, and (ii) plaintiff's discovery, which had been stayed, some of the items of which sought evidence to establish that Foster was acting within the scope of his firm's business. Foster's partners

The core of the District Court's decision is found in **App. B**, where the Court stated that although, "court-appointed mediators and their like have not been around long enough to have generated much in the way of precedent with respect to the extent to which they enjoy the immunity of the court whom they serve," nevertheless, "[o]ther more traditional agents of the judicial process have, however, historically been held to posses such immunity when they act in their official capacities...." In a footnote to this statement the Court cited decisions granting absolute immunity, *inter alia*, to court-appointed psychiatrists, prosecutors, and arbitrators acting within the scope of their duties. The Court then concluded that "court-appointed arbitrators, mediators, case evaluators, and others who are directly involved in ADR programs with express authority from the court may properly invoke the same protection." In

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made no Rule 11 application.

other words, the Court twice named arbitrators, once as comparable officials to mediators and the second time in its holding regarding mediators. It is particularly noteworthy that the Court nowhere discussed the specific functions of mediators, as distinguished from arbitrators, in terms of whether mediators make discretionary determinations.

The Court of Appeals adopted the same line of reasoning by analogy in reaching its decision, but its statements were even broader and more confusing than those of the District Court. In the key passages on the central issue, **App. A** at 7-8, the Court correctly stated that plaintiff's argument was that Foster's letter to the Court "breached Foster's obligations of neutrality and confidentiality." The Court appeared to accept this claim arguendo, stating:

> We assume such a breach for purposes of analysis. [**App. A** at 8]

However, the Court did not hold fast to this assumption. After analogizing Foster's ac-

tion to an error made by a judge while acting in a judicial capacity, the Court then held, in a statement that cannot be reconciled with the assumption quoted above, that,

> [W]e have no doubt that Foster's announcing his recusal, reporting in a general way on the past course of mediation, and making suggestions for future mediation were the sort of things that case evaluators would properly do. **App. A**, at 8 [emphasis added].

The Court then rejected Wagshal's argument that Foster had no immunity because he had already resigned as a mediator when he wrote his letters. The Court broadly held that, "we doubt very much if a modest gap in time between effective recusal and recounting of the events would take the latter out of the immunity." Nothing was stated as to when a "modest gap in time" became more than modest, and was operative.

Finally, the Court rejected the contention that Foster's actions were taken in the complete absence of all jurisdiction. In what was in effect a repetition of its prior

holding, the Court concluded that, "Foster was...discharging the duties of case evaluator under color of authority." **App. A** at 9.

The Court of Appeals, like the District Court, failed to consider whether Foster merited only qualified immunity.

BASIS OF JURISDICTION IN THE DISTRICT COURT

The district court's jurisdiction was based on 42 U.S.C. Sec. 1983 and 28 U.S.C. Secs. 1331 and 1343. Supplemental, jurisdiction of the district court was predicated on 28 U.S.C. sec. 1367 and 1332, to hear and decide claims under the law of the District of Columbia.

REASONS FOR ALLOWANCE OF THE WRIT

Introductory Statement

The concept of absolute immunity from civil suit is judge-created, having its roots in common-law principles. And being defined solely by the judiciary, it is particularly appropriate that this Court provide needed

correction when the lower courts improvidently grant or deny it, a point reflected in the many prior decisions by this Court on the general subject of immunity.

However, this case is, as noted above, one of first impression on the issue of whether a court-appointed mediator should be accorded absolute immunity when he deliberately engages in acts which do not involve any mediation function, and which violate the restrictions placed by the court on the scope of his duties. Neither lower court could find any square precedent for conferring absolute immunity on a mediator. Both concluded, petitioner maintains erroneously, that the mediator is so closely allied to the adjudicative function as to merit absolute immunity even for actions by the mediator outside of the mediation room.

The key error by the Court of Appeals which merits review by this Court is its failure properly to apply the principle which

have been mandated by this Court for determining whether to grant judicially-conferred absolute immunity from civil suit, that is, *a functional analysis*. Instead, the court conferred immunity on mediators by an inaccurate analogy to actual participants in the judicial process, when these other participants have far different functions, which merit diametrically different conclusions.

Another factor which argues for review by this Court is the generally acknowledged increasing use of mediation as an ADR procedure. At first blush, this might seem to support the granting of absolute immunity for mediators regardless of what they may do. However, deeper analysis counsels that the success of mediation as an ADR procedure is inherently grounded on the trust of the litigating participants that the mediator will stay within the boundaries of his function--that he will not at some later time use the knowledge gained in the mediation proceedings

to breach his commitments and obligations of confidentiality and neutrality, in short, that he will not take sides in proceedings before the Court.

Unless the lower court decision in this case is reversed, mediators will henceforth have absolute immunity to violate the trust essential to successful mediation and will be free, if the mediation is unsuccessful, to become advocates for one side or the other, as Foster did. The result will be the creation of a major disincentive against wholehearted participation in mediation by litigants. Moreover, if mediators can, with absolute immunity, violate the confidentiality and neutrality limitations on the scope of their duties, contrary to promises made by the judiciary to participating parties, the integrity of the judicial process itself is subverted. Absent correction by this Court, that is now the law in the District of Columbia Circuit, and the only guide to the

other circuits on this subject.

I. THERE IS OBVIOUS UNEQUAL TREATMENT WHERE MEDIATORS ARE GIVEN ABSOLUTE IMMUNITY WHICH IS DENIED TO MORE SENIOR OFFICIALS IN THE OTHER BRANCHES OF GOVERNMENT

In *Forrester v. White*, 484 U.S. 222, 226 (1988), Justice O'Connor articulated the thought that first comes to the mind when the lower court's decision granting absolute immunity to mediators is compared to the broad sweep of this Court's decisions restricting or denying the grant of absolute immunity sought by officials of other branches:

> One can reasonably wonder whether judges, who have been primarily responsible for developing the law of official immunities, are not inevitably more sensitive to the ill effects that vexatious lawsuits can have on the judicial function than they are to similar dangers in other contexts.

It makes for a highly invidious comparison to note that, while the Court of Appeals in this case conferred absolute immunity from civil suit to an attorney in private practice acting as an ad hoc mediator, this Court has

denied absolute immunity, *inter alia*, to senior aides and advisers to the President of the United States, *Harlow v. Fitzgerald*, 457 U.S. 800 (1982); state governors and their aides, *Scheuer v. Rhodes*, 416 U.S. 232 (1974); and even cabinet officers, *Mitchell v. Forsyth*, 472 U.S. 511 (1985). It is difficult to define a rationale, much less a public policy, that justifies granting only qualified immunity to such officials, and thus making them liable when they knowingly violate fundamental rules, while granting absolute immunity to mediators even when they likewise deliberately violate fundamental rules.

It should be of particular concern that the lower court failed to consider whether qualified immunity, which is the general standard applied to these other officials, might be sufficient to serve the reasonable needs of mediators. This Court has held that in most cases qualified immunity is suffi-

cient to protect officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official authority. *Buckley v. Fitzsimmons*, __U.S.__, 113 S.Ct. 2606, 2613 (1993), quoting *Butz v. Economou*, 438 U.S. 478, 506 (1978). In *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982), this Court reformulated qualified immunity to establish an objective standard that allows liability only where the official violates clearly established statutory or constitutional rights of which a reasonable person should have known. This Court has held that qualified immunity "provides ample support to all but the plainly incompetent or those who knowingly violate the law."[11]

The lower court apparently did not think that this standard would sufficiently protect Foster as a mediator, and Foster himself ar-

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11. *Malley v. Briggs*, 475 U.S. 335, 341 (1986), quoted with approval in *Burns v. Reed*, __U.S.___, 111 S.Ct. 1934, 1944 (1991).

gued against being shielded only by qualified immunity. He correctly defined his self-interest. Had Foster been accorded only qualified immunity, he would have had to answer for his violation of the basic constitutional prohibition against the trial court's receipt of "outside influence," and his denial of petitioner's right to confront and cross-examine witnesses against him, fundamental requirements of a constitutionally fair judicial proceeding. *Parker v. Gladden*, 385 U.S. 363, 364-65 (1966).

II. REVIEW BY THIS COURT IS NECESSARY TO BRING THE LAW REGARDING MEDIATORS INTO CONFORMITY WITH THE PRINCIPLE OF FUNCTIONAL ANALYSIS WHICH IS THE TOUCHSTONE FOR DECIDING IMMUNITY ISSUES

A. The Principle Of Functional Analysis Must Govern

Over and over again, this Court has instructed the federal judiciary to apply the principle of *functional analysis* in deciding whether to extend the grant of absolute immunity to officials claiming it. *See, e.g.,*

Harlow v. Fitzgerald, supra, 457 U.S. at 812 (1982); *Cleavinger v. Saxner,* 474 U.S. 193 at 201-203 (1985), citing *Briscoe v. LaHue,* 460 U.S. 322, 342 (1983)("[O]ur cases clearly indicate that immunity analysis rests on functional categories, not on the status of the defendant."); *Forrester v. White,* supra, 484 U.S. at 224; *Butz v. Economou, supra,* 438 U.S. at 478; *Mireles v. Waco,* __U.S.__, 112 S.Ct. 286, 288-89 (1991).

B. Whenever This Court Has Granted Absolute Immunity In Connection With Judicial Actions, It Has Premised The Grant On Finding *Adjudicatory* Functions, And Mediators Exercise No Adjudicatory Functions

Whenever this Court has considered claims for absolute "quasi-judicial" immunity, it has always emphasized that such absolute immunity is only granted for a function related to discretionary decision-making in the course of *adjudication.* In *Imbler v. Pachtman,* 424 U.S. 409, 423 n. 20 (1976), this Court held that prosecutors are abso-

lutely immune when "acting within the scope of their duties," and explained with obvious approbation:

> Courts that have extended [absolute judicial] immunity to the prosecutor have sometimes remarked on the fact that all three officials-judge, grand juror, and prosecutor-exercise a discretionary judgment on the basis of evidence presented to them [citations] It is the functional comparability of their judgments to those of the judge that has resulted in both grand jurors and prosecutors being referred to as "quasi-judicial" officers, and their immunities being termed "quasi-judicial" as well. [citations]

Conversely, whenever the factor of discretionary adjudication of disputes or discretionary decisions directly relating to such adjudication has been lacking, absolute immunity has been denied to prosecutors. *Burns v. Reed,* 500 U.S. 478 (1991)(absolute immunity denied for prosecutor's function in giving legal advice to police); *Buckley v. Fitzsimmons, supra* (absolute immunity denied to prosecutor for investigative functions and statements at press conference regarding

pending case).

Consistent with this narrowly drawn basis of absolute immunity, it has even been denied to judges for those actions not directly adjudicative. *Forrester v. White, supra,* 484 U.S. at 229 (immunity denied to judge where, "The [personnel] decisions at issue...were not themselves judicial or adjudicative" even though they were "quite important in providing the necessary conditions of a sound adjudicative system"). *See also, Supreme Court of Virginia v. Consumers Union, etc.,* 446 U.S. 719, 731 (1980)(where issuance of Bar Code, "was not an act of adjudication but one of rulemaking," judicial immunity denied to court, but legislative immunity granted); and *Cleavinger v. Saxner, supra,* 474 U.S. at 203 (prison discipline committee denied absolute immunity because, although, "in a sense, [they] do perform an adjudicatory function in that they determine whether the accused inmate is guilty or innocent of

the charge leveled against him," nevertheless their function was not "a 'classic' adjudicatory one...."). *See also, Ex parte Virginia*, 100 U.S. (10 Otto) 339 (1880), cited with approval in *Forrester v. White*, supra, 484 U.S. at 228, where this Court declined to extend immunity to a county judge who was charged in a criminal indictment with discriminating on the basis of race in selecting trial jurors, this function not being one that need be done by a judge.[12]

Since a mediator's function is inherently not "adjudicative" or "adjudicatory," the conclusion compelled by this long line of authority is that mediators do not merit absolute "quasi-judicial" immunity. Unlike an arbitrator, a mediator by definition is not supposed to make any adjudicative decision.

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12. And *compare Mireles v. Waco*, __U.S.__, 112 S.Ct. 286 (1991)(judge held absolutely immune for ordering absent attorney brought before him with force), with *Gregory v. Thompson*, 500 F.2d 59 (9th Cir. 1974), cited in *Stump v. Sparkman*, 435 U.S. 349, 361 n. 10 (1978)(judge held not engaged in an act of a judicial nature in evicting someone from the courtroom by use of physical force).

Thus, in *General Committee of Adjustment v. M.K.T.R.Co.*, 320 U.S. 323, 337 (1943), this Court held that

> The concept of mediation is the antithesis of justiciability.[13]

This Court went on to distinguish mediation from adjudication by observing that, "When a court has jurisdiction it has of course 'authority to decide the case either way.' [citing case]." *Id.* at 337. *See also, District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983), holding that a function is judicial in nature which involves investigation, declaration and enforcement of liabilities as they stand on present or past facts and under existing laws.

This Court has narrowly restricted the functional analysis leading to grants of ab-

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13. Indeed, the District of Columbia Circuit itself relied on this holding regarding the inherent character of mediation in *International Ass'n of Mach. & A. Wkrs. v. National Med.Bd.*, 425 F.2d 527, 538 (1970), but in the case at Bar the Court inexplicably chose to brush this holding aside as having been held "in radically dissimilar contexts," although it is squarely on point. **App. A** at 6.

solute immunity specifically to those classes of persons actually serving in adjudicatory roles within the judicial process. For example, although prosecutors acting within the scope of their prosecutorial functions and witnesses are two classes of persons to whom absolute "quasi-judicial" immunity has been extended, this Court has denied immunity to those who attempt to use analogy to coattail into these classes. *See Malley v. Briggs*, 475 U.S. 335 (1985)(police officer applying to court for search warrant was neither prosecutor nor witness). In *Malley*, this Court held that such a function was subject to qualified immunity and no more, because this would not "impair the judicial process." *Id.* at 342. If a police officer who is, functionally, supposed to appear before the court in an adversarial context as part of the scope of his work, is nevertheless denied absolute immunity, how can absolute immunity be conferred on a mediator who, functionally, is

not supposed to communicate to the court in an adversarial context? Stated differently, how can it "impair the judicial process" to make a mediator subject only to qualified immunity when the mediator is inherently not supposed to be involved in the adjudicative judicial process at all?

The documents circumscribing Foster's duties, **App. D** and **E**, confirm that Foster was denied adjudicative discretion of any kind, including no testimonial or prosecutorial role. These documents contained explicit assurances from the Court to the litigants that Foster would not exercise such adjudicative functions. Indeed, Foster, as a mediator, was the one person in the world most clearly barred from any adjudicative role in the *Sheetz* litigation.

The documents appointing Foster reflect the common understanding of mediation. All the scholarly commentary which Petitioner has found on the subject confirm that neutrality

and confidentiality from the court are inherent in a mediator's function.[14] Here are representative statements:[15]

> [M]any of the putative benefits of mediation can be achieved only if the proceedings are held confidential
> * * *
> ...Confidentiality assures the parties that what is said in the discussions will be limited to the negotiations alone so they can be forthcoming.
> * * *

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14. It is important to distinguish the traditional mediation program in this case--which clearly contemplated that the mediator would not communicate any judgments to the court based on the matters disclosed to him in confidence by the parties--from other kinds of ADR programs in which the appointee is called a "mediator" but in which all parties are informed in advance that the appointee's function involves disclosure of a determination--an evaluation of liability--to the appointing court. *See, e.g., Rhea v. Massey-Ferguson, Inc.*, 767 F.2d 266, 269 (6th Cir. 1985). *See also Kimbrough v. Holiday Inn,*, 478 F.Supp. 566 (E.D.Pa. 1979), where essentially the same program as in *Rhea* was more accurately referred to as "compulsory, nonbinding arbitration" rather than mediation.

For judicial recognition of the distinction between mediators who must observe the restriction of confidentiality and those who are called "mediators," but who *do* report to the court, *see* Bench Manual For Appointment of Mediator, 136 F.R.D. 499, 503 (D.N.J. 1990)("This process [in Michigan] would most accurately be described as a form of arbitration rather than mediation.")

15. Harter, "Neither Cop Nor Collection Agent: Encouraging Administrative Settlements By Ensuring Mediator Confidentiality," 41 *Administrative Law Review* 315, 324-326 (Summer 1989).

> Mediation can only work as designed if the parties have confidence in the mediator's impartiality....
> * * *
> [I]f the mediator were to testify in a subsequent formal proceeding as to what went on during the negotiations the integrity of the entire process could be jeopardized....
> * * *
> [T]he role of mediator is antithetical to that of judge or aribtrator [sic], and forcing the mediator to reveal his or her judgments about the events would greatly harm the ability of the neutral to function as a mediator.

Indeed, because neutrality and confidentiality are inherent characteristics of mediation, at least one commentator who has considered the question of judicial immunity for mediators has suggested that they should be accorded no immunity at all:

> If not protected by an existing statutory or common law immunity, it seems unlikely that the courts will recognize a new common law immunity for mediators. <u>The mediator does not need protection against reprisals for decision-making or testimony and thus does not fit the usual rationale for immunity.</u> Further, mediators closely resemble counselors, lawyers, and other service providers whose primary activities of advising and counseling have not received common law immunity

protection.[16]

In sum, a mediator's traditional attributes inherently fail to square with the adjudicative profile which is necessary for the granting of absolute immunity.

C. Traditional Common-Law Historical Precedent Is A Strong Guide In Making A Functional Analysis, And There Is No Common-Law Precedent For Granting A Mediator Absolute "Quasi-Judicial" Immunity.

A major thread running through this Court's decisions involving claims of absolute immunity is the inquiry as to whether such immunity was traditionally recognized at common law as necessary for the functioning of the judicial process. *See, e.g., Buckley v. Fitzsimmons, supra,* (absolute immunity denied prosecutor for preliminary investigative work or for press conference: "When, as here,...there is no historical tradition of

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16 *Mediation Law, Policy and Practice,* Rogers & McEwen (Clark Boardman Callaghan 1989) at 190 (para. 10.3)(emphasis added, fn. omitted). This of course goes beyond petitioner's position here which is limited to the denial of absolute immunity to mediators who go beyond their mediating functions.

immunity on which we can draw, our inquiry is at an end."); *Antoine v. Byers & Anderson, Inc.*, __U.S.__, 113 S.Ct. 2167, 2170-71 (1993)(court reporters denied absolute immunity; court finds no common-law tradition involving court reporters themselves and rejects analogy to judges making handwritten notes); *Burns v. Reed, supra,* (prosecutor granted absolute immunity for appearing in court and presenting evidence in support of motion for search warrant, but denied absolute immunity for giving legal advice to police because, "neither respondent nor the court below has identified any historical or common-law support for extending absolute immunity to such actions by prosecutors."); *Malley v. Briggs, supra,* 475 U.S. at 339-340 ("Our initial inquiry is whether an official claiming immunity under Sec. 1983 can point to a common law counterpart to the privilege he asserts."); *Cleavinger v. Saxner, supra,* 474 U.S. at 203 ("We do not perceive the dis-

cipline committee's function as a 'classic' adjudicatory one...."); *Tower v. Glover*, 467 U.S. 914, 921 (1984)(immunity denied to public defenders, who had no such immunity at common law because they did not exist, and English barristers, to whom they may be compared, have no absolute immunity). This Court has made it clear that even where discretion in making adjudicative-type decisions exists, that alone is not a sufficient criterion for the grant of absolute immunity where such decision making is not a traditional part of the judicial process. *Cleavinger v. Saxner, supra*.

Mediation also is not a traditional part of the judicial process. Although mediation is by no means a recent development in the resolution of disputes,[17] no court or party in this case has identified any authority in

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17. Note again, *e.g., General Committee of Adjustment v. M.K.T.R.Co.*, text at n. 13, *supra*, a 1943 decision which establishes that mediation is a function known for over a half century in the Federal system. Historical research will doubtless establish that it goes much further back than this.

the traditional common law which equates a mediator with a judge, or a mediation with an adjudication. This lack of historical precedent again points to the conclusion that the lower court put mediators on the wrong side of the fence dividing those individuals who are entitled to absolute immunity from those have some connection to the judicial process but are not so entitled.

If analogy is the key, then how, on the one hand, can a mediator be accorded absolute immunity to make public statements about a case in which he is involved when there is no common law tradition to support his immunity to do so and, by court order, he is not supposed to do so, and yet, on the other hand, the prosecutor in *Buckley v. Fitzsimmons, supra,* is denied absolute immunity when making public statements about a pending case because, *inter alia,* no such function was recognized at common law, even though he is fully entitled to speak?

D. The Court of Appeals Misapplied The Principle of Functional Analysis In Granting Mediators Absolute Immunity

The Court of Appeals extended absolute immunity to mediators such as Foster by several semantic formulations which failed to employ the true functional analysis mandated by this Court.

For example, in a series of circular *ipse dixits* which subsume the decision in the predicate, the Court noted that "intensive involvement in settlement" is common among trial judges, and that a mediator's efforts are therefore not "purely administrative," but rather are "integrally related to adjudication proper...." **App. A** at 6. Whatever the accuracy of the assertion regarding the present-day involvement of trial judges in mediation efforts, the Court ignored the fact that it would be patently improper for a judge conducting a full-scale settlement mediation, including coaxing candid statements from the parties on the twin assurances of

neutrality and confidentiality, thereafter to act as the trial judge during litigation in the event there was no settlement.[18] These functions of mediation and adjudication become antithetical if fully performed by the same person.

The lower court also held that the comments in Foster's letter "were the sort of things that case evaluators would properly do." **App. A** at 8. This is flat out wrong. This *ipse dixit* alone is so far off the mark that, without more, it justifies the granting of certiorari to protect the fundamental concept of mediation from subversion.

The lower court's conclusion that mediation "seems likely to inspire efforts by disappointed litigants to recoup their losses, or at any rate harass the mediator," **App. A**

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18. *See, e.g.*, United States District Court for the District of New Jersey, Bench Manual for Appointment of Mediator, 136 F.R.D. 499, 509:

> ...If the mediation is not successful, the mediator should refer the case back to the judge <u>without comment.</u> (emphasis added).

at 7, is rank speculation made as a ceremonial bow at one of the standards of functional analysis, and cannot withstand attention to the facts. As noted above, mediation has been a presence in the Federal system for over a half century, and doubtless has been no less present in the judicial systems of the states. (*See* notes 13 and 17, *supra*.) This is ample time for a practical test, and there is no record of a flood of complaints against mediators filling court dockets. *Compare, Cleavinger v. Saxner, supra,* where this Court denied absolute immunity to a prison discipline committee. Although this Court was well aware of the real potential threat of a multitude of prisoner cases,[19] it answered that, "We are likewise not impressed with the argument that anything less than absolute immunity will result in a flood of litigation and in substantial procedural bur-

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19. "The number of nonmeritorious prisoners' cases that come to this Court's notice is evidence of this." 474 U.S. at 203.

dens and expense for committee members. This argument has been made before." 474 U.S. at 207. The Court of Appeals expression of concern about a flood of litigation against mediators, with nothing in practical history to support it, deserves no greater credence.

Finally, in what was its most serious fallacy, the Court of Appeals held that even if Foster's actions did breach his obligations of confidentiality and neutrality, Foster, as a mediator, was nevertheless entitled to immunity by the same logic that preserves immunity for a judge who commits an error by acting in excess of his authority. **App. A** at 8. Applying this reasoning to persons other than judges cuts the substantive heart out of functional analysis test. For example, had such an argument been applied to prosecutors--and if their actions in investigating crimes, in advising police officers, and in holding press conferences had been called errors committed in excess of

their authority, then *Buckley v. Fitzsimmons, supra,* and *Burns v. Reed, supra,* which held such actions by prosecutors not to be covered by absolute immunity, would have been decided the other way.

When Foster sent his letters out, this was not merely an error committed in excess of his authority, but a tidal change of role from that of mediator to unsworn witness, unappointed critic, and general officious intermeddler. It is a fallacy worthy of this Court's review to characterize Foster's actions in sending out his letters as merely the possibly erroneous actions of a mediator.

This point leads to the observation that this case presents an opportunity for clarification of prior holdings by this Court regarding the setting of the outer limits of absolute immunity for those other than judges who may have it.

III. THIS CASE PROVIDES A PRECISE OPPORTUNITY FOR THIS COURT TO CLARIFY THE END POINT OF A GRANT OF IMMUNITY, THAT IS, WHEN, BY FUNCTIONAL ANALYSIS, Even ABSOLUTE IMMUNITY IS LOST

This case provides an unusually precise opportunity for this Court to clarify somewhat ambiguous past pronouncements regarding the proper application of a functional analysis to the issue of the endpoint of a grant of immunity. As the preceding discussion makes obvious, petitioner maintains that the greatest coverage to which a mediator would be entitled under established principles is qualified immunity. However, even were this Court to grant mediators absolute immunity, an issue would remain which merits this Court's review, namely, when would such a grant expire? This issue arises in two ways, that is, when does an official who has absolute "quasi-judicial" immunity lose that immunity by acting "outside the scope" of his function; and, second, when does the immunized official lose immunity by resigning his assignment?

A. Clarification Is Needed Of Past Decisions By This Court Regarding The Consequences When An Official Acts "Outside The Scope" Of His Duties.

This Court has spoken of a "scope of duty" limitation on grants of immunity in two somewhat confusing but obviously related contexts, that is, in connection with the grant of absolute immunity and in connection with the grant of qualified immunity. Qualified immunity is clearly subject to the "scope of discretion and responsibilities of the office..." in question. *Scheuer v. Rhodes, supra,* 416 U.S. at 247. And see *Harlow v. Fitzgerald, supra,* 457 U.S. at 815, adopting the language of *Wood V. Strickland,* 420 U.S. 308, 322 (1975), in referring to the official's "sphere of official responsibility...."

However the same standard has been expressed in connection with absolute immunity. In *Imbler v. Pachtman, supra,* 424 U.S. at 422-23, this Court adopted the common-law rule granting immunity to prosecutors and

grand jurors "acting within the scope of their duties." [Fn. omitted] Unless the lower court's conclusion is accepted that a mediator's making an adversarial report to the appointing court comes within "the sort of things that [mediators] would properly do," petitioner maintains that Foster exceeded the scope of his duties even if he is deemed to have absolute "quasi-judicial" immunity while performing his mediating duties.

However, this conclusion leaves unanswered the question of whether the "scope of duties" concept has different meanings and/or applications to absolute, as distinguished from qualified immunity.

In the case of absolute immunity, does the "scope of duties" concept serve as the equivalent of the concept of "acting in the complete absence of all jurisdiction" when applied to persons other than judges? Does the "scope of duties" concept embody a wider "scope" when applied to absolute immunity

contexts than when applied to qualified immunity contexts?[20] These questions have not been answered by past immunity decisions and their answer would provide valuable and necessary guidance.

B. Clarification Is Needed As To When Immunity Ceases After The Immunized Official Leaves Office.

The lower court brushed aside as "frivolous" petitioner's argument that Foster's letters were written after Foster had left office. However, the Court not only regarded as "doubtful" whether Foster's letters "alone effected a recusal" without judicial permission, but also stated that "we doubt very much if a modest gap in time between effective recusal and recounting of the events would take the latter out of the immunity." **App. A** at 8.

These doubts expressed by the lower

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20. Although the concept of jurisdiction is construed broadly where the issue is the immunity of the judge, *Stump v. Sparkman*, 435 U.S. 349, 356 (1978), petitioner has found no similar expression of liberality in construing the concept of "scope of duties" in the case of judicial aides.

court reflect the unsettled state of the law on a key issue raised by petitioner, which should at least serve to take petitioner's position out of the "frivolous" column. With respect to the effectiveness of Foster's letters as effecting his resignation,[21] the Court chose to ignore a line of authority going back to early times in this country which holds the "American rule" to be that a public official may resign his office at any time without permission from anyone.[22]

More important, the Court's "modest gap" doctrine is potentially the source of great mischief unless it is reversed or at least explained. With no hint from the Court as to

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21. Foster used the word "recuse," which is generally applicable to members of the judiciary, and although this terminology was adopted by the lower court, petitioner maintains that since Foster was not a judge or even a "quasi" judge, "resignation" is the proper term.

22. *United States v. Wright*, 28 Fed.Cas. 792, 793 (C.C.D. Ohio 1839)(No. 16775). *See also, Smith v. Brantley*, 400 So.2d 443 (Fla. 1981); and *State ex rel. Ryan v. Murphy*, 30 Nev. 409, 424, 97 P. 391, 394 (1908).

the hiatus it envisioned by its terminology, one man's "modest gap" may be another's laches. Therefore, as things stand now with the lower court's decision, a party who in good faith agrees to participate in a mediation not only must risk having his case clouded and his name tarnished by adversarial recommendations from the mediator while the mediation is in progress, but must also face the risk that, long after the mediation is concluded unsuccessfully, and after passage of a "modest gap in time," the party may be the target of the mediator's attacks and adversarial recommendations during the ensuing litigation proceedings. Petitioner maintains that such a risk is an unconstitutional burden on a party to litigation, and that it violates due process. This potential risk to litigants should be removed by this Court.

IV. REVIEW BY THIS COURT IS CALLED FOR BY IMPORTANT PUBLIC POLICY CONSIDERATIONS

The Court of Appeals in this case did

just what Justice O'Connor suggested in *Forrester v. White, supra,* by protecting the judiciary's own. In doing so, however, it ignored the principle that absolute immunity is of a "rare and exceptional character," and is granted, "only when public policy requires it." *Cleavinger v. Saxner,* supra, 474 U.S. at 202.

Moreover, this Court has emphasized that the judiciary does not have a license to establish immunities in Sec. 1983 actions solely in the interests of what judges believe to be sound public policy. *Buckley v. Fitzsimmons, supra,* 113 S.Ct. at 2613 and 2618, quoting *Tower v. Glover,* supra, 467 U.S. at 922-23. The conclusion is difficult to avoid that the Court of Appeals did just that in this case, and with negative effects on sound public policy.

This Court has reminded itself not to lose sight of the purpose of the immunity doctrine, which is to promote effective gov-

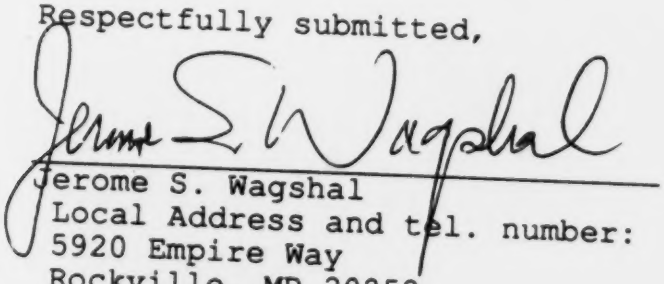
ernment, *Westfall v. Erwin,* 484 U.S. 292, 296-300 (1988), and in this setting that means encouraging participants in the judicial process to be free to act on their convictions. *Stump v. Sparkman, supra,* 435 U.S. at 355. But what beneficent public policy is served by giving mediators, regardless of their convictions, freedom to violate their obligations of neutrality and confidentiality when they wish to do so? Not only will the Court of Appeals' decision tend to impair the sound functioning of any mediation program, but, more seriously, it clouds the integrity of the courts as trustworthy bodies.

On the other side of the scale, it must be remembered that, "absolute immunity contravenes the basic tenet that individuals be held accountable for their wrongful conduct." *Westfall v. Erwin, supra,* at 295. An exception to the fundamental principle of legal accountability is not merited here, and should be reversed.

CONCLUSION

This Court should issue its writ of certiorari to review the lower court's decision, because that decision has resolved an important question of law in a way that conflicts with applicable decisions of this Court and is likely to adversely affect the administration of justice wherever it is followed.

Respectfully submitted,



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